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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 150

HAROLD J. SILVER, D/B/A MUNICIPAL SECURITIES COMPANY AND MUNICIPAL SECURITIES COMPANY, INC., PETITIONERS

v.

NEW YORK STOCK EXCHANGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (R. 256–271) is reported at 302 F. 2d 714. The opinion of the district court (R. 203–238) is reported at 196 F. Supp. 209.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1962 (R. 272). The petition for a writ of certiorari was filed on May 31, 1962, and was granted on October 8, 1962 (R. 273; 371 U.S. 808). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Sherman Act, the Clayton Act, and the Securities Exchange Act of 1934, are set forth in the appendix *infra*, pp. 59–77.

QUESTION PRESENTED

Whether the provisions of the Securities Exchange Act of 1934 give the respondent stock exchange an absolute immunity under the Sherman Act for its action in directing termination of wire connections between its members and petitioners, who are nonmember brokers and dealers.

INTEREST OF THE UNITED STATES

This case presents an important issue involving the reconciliation of the antitrust laws and certain provisions of the Securities Exchange Act of 1934. In the latter Act, Congress provided an extensive system of self-regulation by which the nation's registered securities exchanges, under the supervision of the Securities and Exchange Commission, have the duty and responsibility of insuring that their members observe "just and equitable principles of trade." The various registered exchanges have, over the past quarter of a century, built up a body of rules and precedents which have played an important role in improving the ethical standards in the securities markets. In the present case, the court of appeals held that this statutory scheme of self-regulation confers an implied immunity from the antitrust laws for actions taken by an exchange "within the general scope of [its] authority" to regulate its members,

even though such action in a particular case may be "arbitrary or unreasonable" (R. 258, 264, 266–267).

This ruling is of concern to the United States in two respects: (1) On the one hand, we recognize that, in order to insure that registered exchanges properly carry out their duty to regulate their members, and thus maintain for investors the high ethical standards in the securities business which the Act contemplates, it may sometimes be necessary to permit the exchanges to take action which, were it not for the system of self-regulation provided by the Act, might run afoul of the standards of the antitrust laws. (2) On the other hand, we think it equally important that, because the exchange is a private and not a governmental body, any implied antitrust exemption it may have should be no broader than is essential for the proper performance of its statutory duties under the Securities Exchange Act.

As we shall develop in this brief, the reconciliation of these sometimes conflicting objectives presents difficult and delicate problems. We think it clear, however, that the ruling of the court of appeals—which, as the dissent pointed out (R. 271), gives the exchange a "blanket exemption from the antitrust law"—goes far beyond whatever may be necessary to enable the exchange to accomplish its statutory responsibilities under the Securities Exchange Act. The broad immunity thus conferred finds no justification in the language, the legislative history or the basic regulatory design of that Act.

STATEMENT

This is a civil suit for injunctive relief and damages brought by two over-the-counter brokers and dealers against the New York Stock Exchange, based on the latter's action in directing its member firms to sever their wire connections with the plaintiffs. The district court held that the Exchange had violated Section 1 of the Sherman Act, and granted a permanent injunction. A divided court of appeals reversed, holding that the Securities Exchange Act of 1934 gave the Exchange antitrust immunity.

1. *The operation of the securities markets.*

Securities trading in this country takes place both on the floors of the various securities exchanges, and in the over-the-counter market.[1] There are 14 exchanges registered with the Securities and Exchange Commission; only members of an exchange may trade thereon. The respondent New York Stock Exchange is the largest and most important of the registered exchanges.

The over-the-counter market is a phrase used to describe the trading that takes place other than on the exchanges. The trading takes place directly between brokers and dealers, who may be located in the same city or across the country. Most of the over-the-counter trading involves securities not listed on the exchanges, but a substantial volume of listed securities is also traded. Both exchange members and

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[1] See generally 2 Loss, *Securities Regulation*, pp. 1170, 1277–1287; Friend, Hoffman and Winn, *The Over-The-Counter Securities Markets* (McGraw Hill, 1958).

non-members deal over-the-counter; when a non-member wishes to execute a transaction on an exchange, however, he is required to deal through a member.

Critical to the existence and responsiveness of the modern nationwide securities business is a vast communications network which connects exchanges, members and nonmembers. By this network, almost instantaneous price quotations, offers and bids, may be obtained by brokers and dealers anywhere in the country. For listed securities, the key to the market is provided by the continuous reports of exchange trading on stock quotation services, especially the respondent's, and the private wire connections among members and nonmembers. For unlisted securities, the market is established by the offers communicated between the traders, and the transactions consummated between them, often through private wires connecting the trading firms; there is also a daily quotation service giving the previous day's bid and asked prices.

The importance to the over-the-counter firms of direct private wire connections with member firms was explained by the district court as follows (R. 206):

> * * * [T]he private wire connection * * * is a direct telephone wire over which traders may instantly communicate with one another to exchange information and transact business. A trader in one firm can establish contact with a trader in another simply by flipping a switch.
>
> Depending on the number of wire connections a firm may have, a single trader in over-the-counter securities can, by using different

switches on a board before him, make offers to buy or sell and obtain offers from a variety of other firms within a matter of seconds. These are direct circuits and no dialing or waiting is necessary. Thus traders have the ease and speed of immediate and direct communication. Similar communication is also carried on by direct telemeter or teletype and, in addition, some business is transacted by the more usual means of business communication.

While many dealers in over-the-counter securities are not members of the Exchange many of the member firms and corporations, including those involved here, do an extensive business in over-the-counter securities and unlisted municipal bonds. Private wire connections between over-the-counter securities dealers, who are not members of the Exchange, and member firms, facilitate transactions between them in unlisted securities and municipals, and also provide facilities by which customers of nonmember firms who desire to purchase or sell listed securities can have their orders transmitted to member firms for rapid execution.

2. *The parties.*

Petitioners are two broker-dealer firms, located in Texas, who deal largely in unlisted securities. Petitioner Municipal Securities ("Municipal"), a sole proprietorship, deals primarily in municipal bonds; petitioner Municipal Securities, Inc. ("Municipal, Inc.") handles primarily corporate securities. Both firms were organized by Harold J. Silver.[2] Neither

[2] Harold J. Silver died during the pendency of this case, and his widow, Evelyn B. Silver, as executrix of his estate, was substituted for him in the court of appeals (R. 251).

is a member of the Exchange. Both are registered as broker-dealers with the Securities and Exchange Commission under Section 15 of the Securities Exchange Act and, as such, are subject to the Commission's disciplinary authority. Both are also members of the National Association of Securities Dealers, Inc., an association of over-the-counter brokers and dealers registered with the Commission under Section 15A of the Act, which exercises disciplinary regulatory authority over its members (R. 204). The record indicates that petitioners enjoyed an excellent reputation with respect to their securities business, as indicated by letters of reference submitted to the Exchange by a number of prominent business institutions with which they had dealt (R. 31, 75, 211).

The respondent New York Stock Exchange ("the Exchange") is an unincorporated association registered with the Commission as a national securities exchange (R. 205). The 1375 authorized memberships in the Exchange are held by individuals (R. 203); there are also a large number of member firms (partnerships in which one of the general partners is an Exchange member), and member corporations (corporations in which one or more directors are Exchange members). The constitution and rules of the Exchange give it broad disciplinary powers over its members (R. 194–197). Rule 355, which is here involved, prohibits members or member organizations from maintaining any private wire or other communications system with any nonmember without the prior consent of the Exchange; and pro-

vides that the Exchange "may require at any time that any means of communication be discontinued" (R. 196–197). The rules provide no standards by which the Exchange will authorize or terminate such private communications.

3. *The Termination of Petitioners' Wire Services.*

As of February 1959, petitioners had had for some time private wire connections with the Dallas offices of various members of the Exchange and a private telemeter connection with the New York office of one Exchange member (R. 207–208). Municipal, Inc.'s wire connections with nine firms had been "temporarily approved" pursuant to applications which it made to the Exchange in June and October 1958 (R. 25).[3] These wire connections were utilized to provide a network of rapid communications pertaining to orders primarily for unlisted securities (R. 26–27, 40–41, 205–206). These connections also enabled petitioners to place orders for listed securities; this was done as an accommodation for petitioners' customers and was important to petitioners' business, although the member firms through which the orders were executed received all fees in connection with these transactions (R. 41, 208). Municipal, Inc., also had a stockticker service supplied by the Exchange, which had been temporarily approved in July 1958; this service enabled Municipal, Inc. to get immediate quo-

[3] Municipal also had wire connections with Exchange members. Application for approval of these connections had not been made either by it (apparently because Silver did not know it was required) or by the member firms involved (apparently through oversight) (R. 42, 125).

tations on transactions in listed securities directly from the floor of the Exchange (R. 207, 205).

On February 12, 1959, without notice to petitioners or explanation to its own member firms, the Exchange ordered its members to discontinue their wire connections with petitioners (R. 28). By March 2, 1959, each of the member firms "had complied with this directive and had severed all private wire and telemeter connections" with the petitioners (R. 208). The Exchange also terminated its ticker service with Municipal, Inc. (R. 208).

Attempts by petitioners to ascertain the reason for this action, and to answer any accusations upon which it might have been based, proved futile (R. 73, 74, 210). Silver personally visited the Exchange on February 16, 1959, and had an interview with Walter Coleman, the Assistant Director of the Exchange's Department of Member Firms. Silver told the latter that "his reputation has always been of the best," and that "he could think of no reason whatever, either personal, with respect to any of the officers or personnel, or with respect to the corporation itself, why the Exchange should feel it necessary to withdraw approval of a private wire and ticker" (R. 67). Coleman explained to Silver "the long standing policy of the Exchange about not giving reasons for any disapproval or withdrawal of approval action" (R. 67), "but he would give me no reason for the NYSE's action" (R. 29). Coleman advised Silver that "he was at liberty to request reconsideration" and suggested that, if he did so, he should obtain "qualitative letters of refer-

ence" from friends, business associates, etc. "in respect of his entire organization, including officers and personnel" (R. 67).[4] Petitioners subsequently submitted to the Exchange letters of reference from "various of the member firms with whom plaintiffs had had connections, other securities dealers, Dallas banks and leading New York banks, [who] wrote * * * in substance that their business dealings with plaintiffs had been entirely satisfactory, that plaintiffs had an excellent reputation, and were considered to be responsible, of integrity and of good financial standing. The position of the Exchange remained unchanged" (R. 211).

On February 26, 1959, Silver wrote to G. Keith Funston, President of the Exchange, and Edward C. Werle, Chairman of its Board of Governors, that as a

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[4] Coleman's memorandum of the interview also stated (R. 68):

"He [Silver] asked whether it might expedite matters if he were to try a process of elimination in order to find out the reasons for the Exchange's recent action. For example, he suggested that he might disband his entire organization and just make application as an individual. If that were disapproved, he would know that he himself was an undesirable person as far as the Exchange was concerned, even though there might be other undesirables connected with his organization. If we approved tickers and wires, for him as an individual, he then would add officers or personnel one at a time, and 'wait to see if anything happened' as far as the Exchange is concerned. He asked whether the Exchange would look with favor upon such a procedure, and I told him in my personal opinion the reaction would be unfavorable.

"He said that the other alternative was to do a lot of leg work and paper work in the line of character references, and he felt that this was an almost futile task. However, he indicated that he would follow through along these lines."

result of the Exchange's action "irreparable damage" was being inflicted on the financial condition and reputation of the firm and its 26 employees (R. 71, 72). Silver stated (R. 72):

> I appeal to your sense of justice and ask for the following: (1) Temporary reinstatement of the services, (2) that we be advised of the reasons for the action of the New York Stock Exchange, and (3) that we be given an opportunity to answer any charges and present whatever information you may require.

Mr. Funston replied on March 4, 1959, as follows (R. 73):

> Thank you for writing to me about your problem.
>
> While I can understand your position in wanting to know specific reasons for the recent action taken by the Exchange in connection with private wire and ticker service to your organization, I am sure you can also understand our position in declining to furnish such details.
>
> Before taking any such action, the Exchange always makes a very careful and very thorough investigation.
>
> I have personally reviewed the scope and results of such investigation in this case, and feel that the Exchange acted properly.

Mr. Werle's response advised Silver that (R. 74):

> As a matter of long standing policy, the Exchange does not furnish detailed reasons for its action in either approving or disapproving private wires or ticker service for non-members.

The district court found (R. 210):

> All efforts by Silver to obtain reasons or explanations from the Exchange or an opportunity to meet any charges which had been made against him were met with categorical refusal. * * *

4. *The proceedings below.*

On April 6, 1959, petitioners filed this suit against the Exchange for injunctive relief and damages (R. 35). The complaint (R. 1–12) alleged that the termination and denial of wire services by the Exchange and its members (who were named as co-conspirators) constituted a concerted refusal to deal, in violation of Section 1 of the Sherman Act; and that the withdrawal of the stock ticker violated Sections 1 and 2 of that Act.[5]

In affidavits submitted in connection with pre-trial proceedings and in opposition to petitioners' motion for partial summary judgment (see below), the Exchange revealed for the first time its reasons for terminating petitioners' wire connections. It gave four reasons for its action: (1) that, pursuant to its Industrial Personnel Security Program, the Defense Department in 1953 had suspended the security clearance of Mr. and Mrs. Silver and of Intercontinental Mfg. Co., a government contractor with which they were

[5] The complaint also alleged, as separate causes of action, tort claims based on the Exchange's inducing its members to breach their contracts with petitioners for wire connections, and its allegedly wrongfully injuring petitioners (R. 9–12). The district court has not ruled upon these claims, and they are not involved in the case before this Court.

associated (R. 35);[6] (2) that it had obtained "other" "information believed to be derogatory to the Silvers," which it declined to reveal (R. 35, 98–99);[7] (3) that the data which Silver submitted to the Exchange in connection with the applications for wire services had failed to list the names of two companies (but not Intercontinental) with which he had been associated; and (4) that Silver had sold shares of stock in U.S. Hoffman Machinery Corporation (received as a result of its merger with Intercontinental) two months after stating in writing that he had "no present intention" to sell such stock (R. 96–97, 214–215).

On April 26, 1960, petitioners moved for partial summary judgment and for a preliminary injunction (R. 15–16). In an accompanying affidavit, Silver stated that since February 13, 1959 (the date of termination of the wire services) the businesses of both Municipal and Municipal, Inc., had "steadily deteriorated"; that "[e]fforts to stem this tide" by Municipal, Inc., were "unsuccessful" and it ceased to exist as a

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[6] Four months after the Exchange had terminated petitioners' wire services, this Court held in *Greene* v. *McElroy*, 360 U.S. 474, that the Industrial Personnel Security Program was invalid. On August 23, 1960, the Defense Department, in accordance with the *Greene* decision, vacated and expunged from its records the revocation of the Silvers' security clearance (R. 231).

[7] Respondent refused to reveal such allegedly derogatory information to petitioners unless they agreed not to sue the Exchange, its investigative agencies or its informants for defamation. When petitioners refused to do so, the Exchange offered to reveal the material to the court *in camera*, but without disclosing it to petitioners, but the court declined to receive it on that basis. (R. 214.)

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functioning organization by October, 1959; and that the Exchange's action "not only reduced MSC's [Municipal's] gross profits more than fifty percent during 1959, but it caused a reduction in the total number of MSC's employees from seventeen on February 13, 1959, to seven by January 1, 1960. But this steady attrition of MSC's business and of its organization could be halted or deterred if NYSE member-firms are permitted to take independent action to restore or establish wire connections with MSC" (R. 37).

The district court (Judge Bryan) granted partial summary judgment for petitioners on the claim relating to private wire connections.* The court ruled that the Exchange's actions "will cause loss and damage to these plaintiffs in the future" (R. 234), and enjoined the Exchange "from preventing, prohibiting or interfering with the establishment, maintenance and operation of private wire and telemeter connections between plaintiffs and defendant's member firms and member corporations for the purpose of trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange." (R. 239–240.)* The court rejected the Exchange's claim that its action

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*The court held that the claim that the Exchange had violated Sections 1 and 2 of the Sherman Act by terminating its ticker service with Municipal, Inc. raised issues of fact that precluded decision of the question on a motion for summary judgment (R. 234–238).

*The court also concluded that the Exchange was liable for such damages as petitioners could prove at trial (R. 233).

was immune from the antitrust laws (R. 216–224). The court further held that, absent such immunity, the termination of private wire services by the member firms was a concerted refusal to deal which was a *per se* violation of the Sherman Act (R. 224–229). The court considered and rejected each of the four grounds relied on by the Exchange as justification for its actions (R. 229–233), and concluded that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiff's wire connections be severed" (R. 233).

Respondent appealed the order granting injunctive relief,[10] and a divided court of appeals reversed, holding that while

> * * * [i]t is quite clear that there would be, at the very least, a grave doubt as to the legality of the action of the defendant if it is not insulated from liability under the Sherman Act * * * [w]e hold * * * that the action of the Exchange in bringing about the cancellation of the private wire connections with members of the Exchange was within the general scope of the authority of the Exchange as defined by the 1934 act and therefore outside the coverage of the Sherman Act. [R. 258.]

Judge Waterman dissented on the ground that the court's decision conferred upon the Exchange a "significant privilege to which I believe no statute entitles

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[10] Respondent also sought to appeal under 28 U.S.C. 1292(b) from the portion of the district court's judgment adjudging it liable for whatever damages petitioners could establish, but the court of appeals denied leave to appeal on that issue (R. 249).

it," and because "as applied to the facts in this case, there is no clear repugnancy between the Securities Exchange Act of 1934 and the Sherman Act, which requires the blanket exemption from the antitrust law" found by the majority (R. 268–271).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the reconciliation of two broad and important, although sometimes conflicting, sets of statutory policies. On the one hand, there is the policy of the antitrust laws favoring the preservation and protection of competition in our economy in its broadest scope. On the other hand, there is the policy of the Securities Exchange Act of 1934 placing upon the nation's registered securities exchanges the duty of insuring that their members observe "just and equitable principles of trade." The problem arises from the fact that, in carrying out their statutory obligations, the exchanges and their members may be required to take concerted action to discipline members which, unless immunized by the Securities Exchange Act, might violate the Sherman Act.

No case involving the clash of such important statutory objectives—and particularly not the first case before this Court—can be decided without careful analysis of the underlying policy considerations involved, and we shall therefore develop such considerations in some detail. On the other hand, while these policies are necessarily extremely broad, their very breadth, and the possible distinctions that might be drawn in applying them to different situations, strongly dictate against attempting to reach any broad

or sweeping conclusions as to the general scope of any immunity the exchanges may have for actions taken in the exercise of their statutory function of self-regulation. Here, as in so many areas of the law, the precise scope of any immunity must be developed by the process of case-by-case adjudication.

The problem of the exchanges' antitrust immunity may rise in two different contexts. The first situation—which is not presented by, and therefore need not be resolved in this case—is where the exchange promulgates a particular rule, and the validity of the rule itself is challenged before the Commission as inconsistent with the statutory standards because of its anticompetitive consequences. (See p. 29, *infra*, for discussion of the Commission's authority to review the rules of an exchange.) In reviewing an exchange rule, the Commission considers the policies of the antitrust laws. See *In the Matter of the Rules of the New York Stock Exchange*, 10 S.E.C. 270, 286; *In the Matter of National Association of Securities Dealers, Inc.*, 19 S.E.C. 424, 433. The Securities Exchange Act may contemplate that the validity of such a rule should be determined in the first instance by the Commission, but questions as to the Commission's authority to approve a rule which it is alleged violates the standards of the antitrust laws, or as to the effect of such approval, need not be faced or decided in this case.[11]

[11] While neither the Securities Exchange Act nor the Commission's rules of practice specifically authorize the filing of a complaint with the agency by a person adversely affected by a rule of an exchange, the Commission would ordinarily

For in the present case, as we view it, the primary challenge is not to the rule itself, but [redacted] rather to the validity of its application in a particular instance.[12] The precise issue before the Court is whether the Exchange has absolute immunity against liability under the antitrust laws for the damage inflicted upon the petitioners by directing its members to terminate petitioners' direct wire connections, even though the Exchange's action was not based upon a reasonable investigation and was an arbitrary and irrational conclusion from the known facts. We think that the answer to this question must be negative, and that no more should be decided in this case.

In the argument that follows we will show that there is nothing in the basic statutory scheme of the Securities Exchange Act which justifies an absolute immunity from the antitrust laws. On the contrary, settled principles governing the scope of implied antitrust immunity dictate against such a broad exemption. There will be no violation of the statutory plan for self-regulation if an exchange is denied absolute

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entertain such a complaint if it made substantial allegations.

[12] Petitioners challenge the rule as improper because it would authorize arbitrary action (Br. 2, 17–20). We assume (see, *infra*, p. 43) that the Exchange was acting in the view that the promotion of just and equitable principles of trade required Exchange members to refrain from having direct wire connections with non-member firms lacking the integrity and reliability necessary in the securities business. We think that there can be no objection to such a standard of conduct under a system of self regulation.

antitrust immunity for arbitrary or unreasonable action in cutting off wire connections of a nonmember, since imposing antitrust liability for such conduct will not interfere with the attainment of "just and equitable principles of trade" in securities transactions.

ARGUMENT

I

APART FROM ANY IMMUNITY PROVIDED BY THE SECURITIES EXCHANGE ACT OF 1934, THE ACTION OF THE EXCHANGE IN DIRECTING ITS MEMBER FIRMS TO SEVER WIRE CONNECTIONS WITH THE PETITIONERS VIOLATED SECTION 1 OF THE SHERMAN ACT

Unless the action of the Exchange in terminating petitioners' wire services is immunized from the antitrust laws by the Securities Exchange Act of 1934 (and, as we show in Point II, *infra*, it is not), it plainly violated Section 1 of the Sherman Act.

In the absence of immunity, the securities business, like every other form of interstate trade and commerce, is of course subject to the Sherman Act. *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533; *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485; cf. *United States* v. *Morgan*, 118 F. Supp. 621 (S.D. N.Y.).

The New York Stock Exchange is an unincorporated association, each of whose members agrees upon

joining "to comply with the directives issued by the Exchange pursuant to its constitution and rules" (R. 224). Under the constitution, failure to comply with such directives subjects a member to disciplinary action, including possible expulsion (Art. XIV, Sec. 6, R. 195). The constitution gives the Board of Governors the power to approve or disapprove any application for wire or other communications connections between any member and nonmember, and the Board "may require the discontinuance of any such * * * connection (Art. III, Sec. 6, R. 194–195). Similarly, the rules of the Exchange prohibit any wire or other communications connection between members and nonmembers without the prior consent of the Exchange, and provide that "The Exchange may require at any time that any means of communication be discontinued" (Rule 355, R. 196–197).

In the present case, it is conceded that the member firms terminated petitioners' wire connections only after the Exchange had directed them to do so, and obviously because of that instruction. The termination thus constituted a concerted refusal to deal with the petitioners by the Exchange and its member firms. As the district court explained (R. 225–226):

> The effect of this combination was to bar the member firms named as co-conspirators from exercising their freedom to carry on trade and commerce with these plaintiffs according to their own choice and discretion. They have placed restraints upon their own liberty of action and have foreclosed themselves from exercising their own independent business judg-

> ment with respect to their dealings with these plaintiffs. They are limited in such dealings by the dictates of the combination which has substituted its business will and judgment for their own. * * *
>
> * * * * *
>
> It is not necessary to show that the combination prohibited all dealings between the member firms involved and the plaintiffs, as the Exchange seems to contend. The effect of the Exchange directive to the members of the combination was to foreclose them from dealing with the plaintiffs by means of the private wire connections which were a normal means of doing business in over-the-counter and unlisted municipal securities. The combination operated to deprive plaintiffs of a means of doing business which was of substantial value to them in the conduct of their business. The very nature of the business in which plaintiffs were engaged makes this abundantly plain. This means of doing business was available to others who did not fall within the proscription directed against plaintiffs. There were numerous other non-member broker/dealers in Dallas, and in other parts of the country, who maintained such private wire connections with member firms and continued to use them.

Such an organized boycott or concerted refusal to deal is ordinarily illegal *per se* under Section 1 of the Sherman Act. *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457. Even if the Exchange as an organized exchange for public trading

in securities can claim a right to be governed by less strict rules (cf. *Chicago Board of Trade* v. *United States,* 246 U.S. 231), the action of the Exchange in this case runs afoul of the principle that when a private group has control over access to a market—and a trading exchange is a classic example of such power—the antitrust laws require it to accord access to that market, on an equitable and nondiscriminatory basis, to all those in the trade. This principle has been applied to require access to railroad terminal facilities through which rail traffic flowed across the Mississippi River at St. Louis, *United States* v. *Terminal R.R. Ass'n,* 224 U.S. 383; to an association with monopoly power over newsgathering, *Associated Press* v. *United States,* 326 U.S. 1; to a produce exchange building, *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.,* 194 F. 2d 484 (C.A. 1), certiorari denied, 344 U.S. 817; to a tobacco market, *American Federation of Tobacco Growers* v. *Neal,* 183 F. 2d 869 (C.A. 4); to a fish market, *United States* v. *New England Fish Exchange,* 258 Fed. 732 (D. Mass.); and to a livestock market, cf. *Anderson* v. *United States,* 171 U.S. 604, 618–619. It is no less applicable to the present case, where the respondent has denied petitioners access to the facilities of a stock exchange "which were a normal means of doing business in over-the-counter and unlisted municipal securities" and which were "of substantial value to them in the conduct of their business" (R. 226); and thereby denied the petitioners "the opportunity to do business with the members of the Exchange upon the same terms and conditions as

others in the over-the-counter and municipal securities markets in which they were engaged" (R. 225).

II

THE SECURITIES EXCHANGE ACT DOES NOT PROVIDE ANTITRUST IMMUNITY FOR THE EXCHANGE'S ACTIONS IN THIS CASE

The Securities Exchange Act of 1934 contains no explicit antitrust immunity for actions taken by registered securities exchanges. An immunity will therefore be implied only if there is a clear repugnancy between the 1934 Act and the antitrust laws, and, since it is not to be implied lightly (*California* v. *Federal Power Commission*, 369 U.S. 482, 485), any such immunity is limited to the extent of the repugnancy. *Id.*, at 485–486; *United States* v. *Borden Co.*, 308 U.S. 188, 198; *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 456–457.

The court of appeals in effect held that the provisions of the 1934 Act requiring registered exchanges to insure that their members observe "just and equitable principles of trade" were repugnant to, and hence by implication provided immunity from, Section 1 of the Sherman Act. Its rationale was that subjecting the exchanges to liability under the Sherman Act for actions taken in the purported performance of their statutory duty to regulate their members might deter them from properly performing that duty. As a consequence, the court held, the Securities Exchange Act must be read as conferring upon the exchanges what the dissenting judge described

(R. 271) as a "blanket exemption" from the antitrust laws for any action taken "within the general scope of the[ir] authority * * * as defined by the 1934 Act," even though in a particular case the action of the Exchange might be "arbitrary or unreasonable" (R. 258, 267).

There is nothing in either the legislative history or the general plan of the 1934 Act, however, which even suggests that Congress intended to confer such sweeping antitrust immunity upon private groups. Such an immunity would require a showing that the entire system of self-regulation by the exchanges is basically incompatible with the standards of the Sherman Act. As we show below, there is no such basic inconsistency between the two statutes, and there is accordingly no basis for implying the sweeping antitrust immunity found by the court of appeals.

The history and language of the Act themselves strongly indicate that Congress did not intend to create any antitrust immunity so sweeping as to cover the present case. For at the time the Act was passed, it was established that securities and other exchanges were subject to suit under federal and State antitrust laws for excluding or discriminating against nonmembers.[13] It is most unlikely that

[13] See Meyer, *The Law of Stockbrokers and Stock Exchanges* (Baker, Voorhis & Co., 1931), Sec. 4; *Anderson* v. *United States*, 171 U.S. 604; *Ertz* v. *Produce Exchange Co.*, 82 Minn. 173; *State ex rel. Hadley* v. *Kansas City Live Stock Exchange*, 211 Mo. 181; *Pirnie, Simons & Co.* v. *Whitney*, 144 N.Y. Misc. 812, 259 N.Y. Supp. 193 (Sup. Ct., N.Y. County). See the federal antitrust cases on access to markets cited at p. 22, *supra*.

Congress, in imposing federal regulatory controls upon the exchanges, simultaneously intended to eliminate such private rights of action. Indeed, Section 28(a) of the Act (15 U.S.C. 78bb) provides for the continuation of such suits, since it states that "[t]he rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity * * *."

To be sure, there may be situations in which an exchange, in order effectively to perform its function of regulating its members, may be required to take action against a member which might otherwise violate antitrust standards and, to that extent, antitrust immunity may properly be implied for actions by the exchange. But such an immunity would be far narrower than the broad immunization conferred by the court of appeals for any action, however arbitrary or unreasonable, taken by the exchange "within the general scope of [its] authority * * * as defined by the 1934 Act * * *" (R. 258), or "within the scope of its statutory authority in the enforcement of its rules * * *" (R. 264). Such an immunity is not ordinarily extended even to public officials.

A. REGISTERED SECURITIES EXCHANGES HAVE, AT MOST, A QUALIFIED PRIVILEGE FOR ACTIONS TAKEN WITHIN THE GENERAL SCOPE OF THEIR AUTHORITY AS DEFINED IN THE SECURITIES EXCHANGE ACT.

1. *The statutory scheme of the Securities Exchange Act of 1934.*

(a) The Securities Exchange Act of 1934 provided an extensive federal regulatory system for the securi-

ties business. Although the exchanges themselves had previously endeavored to eliminate abuses in the business, government regulation was needed because such self-regulation had proven inadequate. As President Roosevelt explained, in proposing the 1934 legislation, "the managers of these exchanges have, it is true, often taken steps to correct certain obvious abuses" but, to "be certain that abuses are eliminated," "a broad policy of national regulation is required" (S. Rep. No. 792, 73d Cong., 2d Sess., p. 2; H. Rep. No. 1383, 73d Cong., 2d Sess., p. 2).

The Senate Report explicitly discussed "Inadequacy of Self-Regulation of Exchanges." It pointed out that governmental regulation had always been resisted by stock exchanges "on the ground that they are sufficiently able to regulate themselves to afford protection to investors" (S. Rep. No. 792, 73d Cong., 2d Sess., p. 4). The Committee rejected, as "unsound," the contention "that internal regulation obviates the need for governmental control," because, among other reasons (*id.* at 4–5):

> * * * the attitude of exchange authorities toward the nature and scope of the regulation required appears to be sharply at variance with the modern conception of the extent to which the public welfare must be guarded in financial matters. Their adherence to the view that manipulation, pool activities, and the creation of illusory "price mirages" are proper and legitimate, except where certain technical violations of their rules are involved, is inconsistent with the type of regulation the public interest demands.

> The manipulation of the so-called "repeal stocks" on the New York Stock Exchange during the summer of 1933 illustrates the ineffectiveness of self-regulation. * * * The inability of the stock exchange authorities even to discover the flagrant abuses unearthed by the committee indicates that a Federal regulatory body could deal with such practices more effectively than the exchanges themselves."[14]

While Congress thus recognized in the 1934 Act the need for governmental control, it also provided, as an integral part of the regulatory system, for continuation and strengthening of self-regulation by the exchanges. 2 Loss, *Securities Regulation* (2d ed., 1961), pp. 1175–1178, 1180–1182; H. Rep. No. 1383, 73rd Cong., 2d Sess., p. 15.

(b) The 1934 Act contains a number of provisions designed to insure vigorous and effective self-regulation by the exchanges. Section 6 (15 U.S.C. 78f) provides for the registration of exchanges with the Securities and Exchange Commission, and Section 5 (15 U.S.C. 78e) prohibits, with certain exceptions, the use of the facilities of unregistered exchanges.

Section 6(a) provides that the registration statement must include an agreement by the exchange "to comply, and to enforce so far as it is within its powers compliance by its members" with the Act and the Commission's rules and regulations there-

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[14] The abuses which the Exchange Act was intended to meet are summarized in Tracy & MacChesney, *The Securities Exchange Act of 1934*, 32 Mich. L. Rev. 1025, 1027–1036.

under. Section 6(b) requires that the rules of a registered exchange must include

> provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

Section 6(d) provides for registration if it appears to the Commission that the exchange is so organized as to be able to comply with the Act and the rules thereunder, and that its rules "are just and adequate to insure fair dealing and to protect investors."

The registration requirements thus not only impose upon an exchange the duty of enforcing compliance by its members with the statute and the Commission's rules thereunder, but affirmatively require the exchange to insure that its members observe "just and equitable principles of trade" and engage in "fair dealing" so as to "protect investors." As the court of appeals correctly ruled (R. 263), reaffirming its earlier decision in *Baird* v. *Franklin*, 141 F. 2d 238 (C.A. 2), certiorari denied, 323 U.S. 737, "the Act makes it the duty of the Exchange to enforce the rules which it is required to file with the Commission." In the *Baird* case, the court ruled that an exchange may be liable for damages resulting from failure to enforce its rules.

Section 19 (15 U.S.C. 78s) gives the Commission both disciplinary and supervisory powers over registered exchanges which are designed, among other

things, to insure proper performance by the exchanges of their regulatory responsibilities. Thus, Section 19(a) authorizes the Commission, when it believes it to be "necessary or appropriate for the protection of investors," to suspend or withdraw the registration of any exchange if it has violated the Act or Commission rules "or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon"; and to suspend or expel any member or officer of an exchange who has violated the Act or its rules or who "has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction" the Act or Commission rules.

Section 19(b) permits the Commission itself to make changes in the rules of an exchange. If an exchange refuses to make specified changes requested by the Commission, the latter, if it determines that such changes are "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange," may alter or supplement the rules of the exchange with respect to specified subjects.[15]

[15] Section 19(b) provides that the Commission may make changes in the rules of an exchange "in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships: (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof: (3) the listing or striking from listing of any security: (4) hours of trading:

(c) The scope of self-regulation by the securities industry was significantly broadened in 1938 by the so-called Maloney Act, which added Section 15A to the Act (15 U.S.C. 78o–3, 52 Stat. 1070). This section dealt primarily with the over-the-counter market.[15] Section 15A(b) provides for Commission registration of associations of brokers and dealers who may or may not be members of a registered exchange. Such an association must have rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market," and "not

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(5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

[15] The legislative history indicates that self-regulation of this segment of the industry was intended not only to lighten the Commission's enforcement problems, but also to "control * * * ethical practices in this business, which is not a field which the Government can very well occupy." Testimony of Commissioner Mathews in Hearings on S. 3255 before the Senate Committee on Banking and Currency, 75th Cong., 3d Sess., p. 10 (1938).

designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges." Section 15A(b)(7). The rules may provide, however, that no member may deal with nonmembers "except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such members accorded to the general public." Section 15A(i)(1).[17] The rules must also provide for disciplining of members for violation thereof and for "a fair and orderly procedure" with respect thereto. Section 15A(b) (8) and (9).

Unlike the provisions dealing with registered exchanges, however, which do not provide for Commission review of disciplinary actions against their members, Section 15A specifically provides for review by the Commission of disciplinary actions by such associations. Section 15A(g) and (h). Such Commission action is, in turn, subject to judicial review. 15 U.S.C. 78y. Finally, Section 15A(n) provides that Section 15A is to prevail over "any provision of any law of the United States in force on June 25, 1938" with which it conflicts.

Only one association of over-the-counter brokers and dealers has registered with the Commission: the

[17] The effect of this provision, as the Commission has pointed out, is that it is "virtually impossible for a dealer who is not a member of the NASD [an association of brokers and dealers] to participate in a [securities] distribution of important size." *In the Matter of National Association of Securities Dealers, Inc.*, 19 S.E.C. 424, 441.

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National Association of Securities Dealers, Inc. ("NASD").

2. *The pertinent public policy considerations.*

In determining whether, and to what extent, the foregoing statutory program provides an implied immunity for registered exchanges, because of its repugnancy to the antitrust laws, two competing public interest considerations are of primary significance: (a) the importance of preserving the effectiveness of the statutory system of self-regulation, and the extent to which imposing antitrust liability would weaken such system; and (b) the danger of possible misuse of the exchange's regulatory powers to accomplish anticompetitive objectives. The latter danger may be minimized to the extent that the Securities Exchange Act provides a remedy for redressing wrongful action by an exchange.

(a) *The importance of preserving the effectiveness of self-regulation.*—Self-regulation by the exchanges today plays a vital role in the policing of securities markets and in the development of high ethical standards and practices in the securities business. No adequate substitute for the protection of the investing public is readily available. Detailed Commission control of every phase of the activities of exchanges and their members would not only involve an expansion of the Commission's organization and operations to a degree which Congress regarded as impractical if not undesirable, but would also run counter to the concept of achieving through self-regulation even higher

standards than those which might be imposed by statute.[18]

To some degree self-regulation may be weakened by the application of concepts of *per se* liability under the antitrust laws which were evolved for the purpose of suppressing anticompetitive combinations without inquiry into alleged justifications therefor in particular cases. Self-regulation necessarily involves concerted adherence by the members of the exchange to standards and restrictions evolved in the self-regulatory process and requires concerted action by exchange members to make effective the sanctions imposed to secure compliance. In addition, Commission supervision of self-regulatory activities may, and frequently does, involve a weighing of alternatives and of perhaps conflicting objectives in the context of particular practices and problems.[19]

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[18] Pertinent to this concept is the Congressional testimony of former Commissioner Mathews in relation to similar provisions for self-regulation of the over-the-counter market contained in the Maloney Act. Commissioner Mathews said:

> [E]ven if the funds were furnished for a direct government regulatory program, and even if an adequate staff were provided, and even if there were no problems of securing enforcement through the courts in any cases that you and I would agree there should be enforcement in, a great many of the abuses in the securities business are not matters of definite illegality; they are matters of ethics.
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> * * * There is a vast field for the control of ethical practices in this business, which is not a field which the Government can very well occupy. [Hearings on S. 3255, Senate Committee on Banking and Currency, 75th Cong., 3d Sess., p. 10.]

[19] In so doing, one of the factors considered by the Commission is the impact of rules and practices upon competition. See fns. 27, 28, and pp. 46–47, *infra*.

An exchange and its members may be reluctant to act vigorously in disciplining erring members if they are subject to possible antitrust liability should it ultimately turn out that they went beyond the bounds of permissible regulatory action in the particular case. The same policy underlies the privileges the law has always accorded public officials. In some instances, it is absolute; thus, government officials have absolute immunity for defamatory statements made in the course of their official duties, so that they "should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties." *Barr* v. *Matteo,* 360 U.S. 564, 571, see *Spalding* v. *Vilas,* 161 U.S. 483, 498–499, and Judge Learned Hand's opinion in *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949. This was apparently the rationale of the court of appeals in this case, which cited *Gregoire* v. *Biddle* for its statement that "[i]n the exercise of the powers which they are required by the statute to exercise the exchanges must be immune from prosecution under other legislation" (R. 267). In other instances, even public officials enjoy only a qualified privilege. *E.g., Restatement of Torts,* §§ 121, 143, 146, 147, 196, 204.

To draw the analogy to the absolute privilege of government officials emphasizes the critical distinction between such cases and the present one. For the nation's stock exchanges are not governmental agencies, but private regulatory bodies exercising, under the general supervision of the Commission, regulatory

functions which ordinarily are exercised only by the government itself—and without the protections against arbitrary action which customarily accompany the exercise of such power by the government (see *infra*, pp. 38–39, 41–42, 48–49). On the other hand, the fact that the exchanges are non-governmental organizations is not conclusive proof that no privilege was intended to accompany the obligation of self-regulation. Private persons are often given privileges in the public interest. In an earlier day, private citizens were not liable for destroying property in the path of a fire where necessary to save larger portions of a city, if they acted in the reasonable belief that the destruction was necessary.[20] Similarly, a private citizen has a qualified privilege to make arrests,[21] and to abate what he reasonably believes to be a public nuisance.[22] Although the analogies are not exact, these familiar precedents may be helpful in determining the extent to which a privilege ought to accompany the duties under the Securities Exchange Act which it is in the public interest to have the exchanges perform.

(b) *The danger of misuse of the exchange's regulatory authority.*—To hold that the Securities Exchange Act gives exchanges absolute immunity from the antitrust laws—and, perhaps, by the same token,

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[20] Restatement of Torts, § 196; Harper and James, *The Law of Torts* (1956), § 1.16.

[21] Restatement of Torts, § 119; 143; Harper and James, *The Law of Torts* (1956), § 3.18.

[22] Restatement of Torts, § 201, 203.

from other liability as well (see page 40, *infra*)—for all action "within the general scope of the[ir] authority * * * as defined by the 1934 Act" (R. 258), would open the door to three dangers:

(1) There is a wide field of action in which the antitrust laws remain the only restraints upon misconduct by a securities exchange. The exchanges' duty to insure "just and equitable principles of trade" does not authorize them to control all competitive relationships between exchange members and nonmembers. Nor was the regulatory scheme of the 1934 Act designed to facilitate the restriction or elimination of competition in the securities business. On the contrary, as the Commission itself has recognized, "one of the declared purposes" of the Act is the "fostering" of competition among exchanges and between the exchanges and the over-the-counter market—"a purpose which is closely related to the public policy" of the antitrust laws.[23] The standards of conduct which the Act requires the exchanges to foster among their members are comprehended by the terms "just and equitable principles of trade" (Section 6(b)), "fair dealing" (Section 6(d)), and "protect[ion of] inves-

[23] *In the matter of the Rules of the New York Stock Exchange*, 10 S.E.C. 270, 286–287. The Commission there invalidated a rule of the respondent providing for suspension or expulsion of any member who publicly dealt for his own account on another exchange in securities listed on another exchange. This was the only case in which the Commission ever exercised its power under Section 19(b) to "alter or supplement" the rules of an exchange.

tors" (Section 6(d)). While the Act does not define these generalized terms, both their statutory context and the abuses against which the Act was directed (see *supra,* pp. 26–27) show that they refer to the ethical standards of the securities business. In particular, the phrase "just and equitable principles of trade" was understood in the industry, at the time the Act was passed, as relating to ethical standards.[24] The 1938 Maloney Act used the same words in defining the conduct which associations of brokers and dealers were to promote (see *supra,* p. 30), and a Commission member testified at the hearings on those amendments that the phrase referred to "matters of ethics" and "ethical practices in the business."[25] The

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[24] *E.g., In re Haebler* v. *New York Produce Exchange*, 149 N.Y. 414, 44 N.E. 87 (1896) (conduct in violation of morals and commercial honor and integrity); *Dickenson* v. *The Chamber of Commerce of the City of Milwaukee*, 29 Wisc. 45 (1871) (something more than purely legal obligation, but violated by a member's breach of contract); see *In the Matter of National Association of Securities Dealers, Inc.*, 19 S.E.C. 424, 484-485.

[25] Commissioner Mathews stated that the phrase "conduct * * * inconsistent with just and equitable principles of trade" covered abuses which "are not matters of definite illegality; they are matters of ethics. * * * There is a vast field for the control of ethical practices in this business, which is not a field which the Government can very well occupy. * * * An association of this sort, if it is successful, must be able to control those practices of its members which, in the language of the stock exchange rule, are inconsistent with just and equitable principles of trading." Commissioner Mathews characterized this concept as including "methods of doing business, which while not technically illegal, are nevertheless unfair to customer and decent competitor alike, and are seriously damaging to the mechanism

Commission's own decisions similarly recognize that the phrase connotes ethical standards.[26]

The existence of the wide area in which there is no conceivable occasion for giving the exchanges an immunity from antitrust prosecution or civil liability is the strongest evidence that the Securities Exchange Act does not confer a blanket immunity under the antitrust laws. Furthermore, it is apparent that there must be some authority other than the exchanges themselves with power to draw the line between actions which constitute proper self-regulation and those which amount to a forbidden attempt to control the competitive relationships between members and nonmembers. See p. 45, *infra*.

(2) An absolute immunity would also permit the exchanges, under the cover of merely regulating "ethical" practices, to engage in conduct which was actually designed to, and did, suppress competition among exchange members, or between such members and nonmembers. For example, under the guise of disciplining its own members, an exchange might regulate access to, and conduct upon, the over-the-counter markets by nonmembers, many of whom compete directly with the exchange and its members for trade in listed and unlisted securities. See *In the Matter of the*

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of the free and open market." (Hearings on S. 3255, Senate Committee on Banking and Currency, 75th Cong., 3d Sess. (1938), pp. 10–11, 16.)

[26] See, *e.g.*, *Samuel B. Franklin Co.*, Securities Exchange Act Release No. 5603 (Nov. 18, 1957), p. 5; *In the Matter of Lerner & Co.*, 37 S.E.C. 850 (1957); *In the Matter of National Association of Securities Dealers, Inc.*, 19 S.E.C. 424 (1945).

Rules of the New York Stock Exchange, 10 S.E.C. 270, 286.[27] The claim that anticompetitive devices are being utilized only to eliminate improper practices and raise ethical standards in an industry is no novelty in antitrust litigation, but all too frequently the "unethical" conduct sought to be eliminated turns out to be the vigorous competition which the antitrust laws are designed to stimulate and protect. See, *e.g., Sugar Institute* v. *United States,* 297 U.S. 553, 599; *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457; *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 489.

(3) The obverse of every immunity or privilege may be unredressed injury to the victim. To the extent that a registered exchange is given immunity for action that it erroneously supposed to be necessary to promote just and equitable principles of trade, some broker or dealer who has been denied access to the market will suffer loss without compensation for what otherwise would be an actionable wrong. The injury may result from any one of numerous causes—malice, arbitrariness, carelessness or a justifiable mis-

[27] In that case (discussed *supra*, note 23), the Commission modified a disciplinary rule of the respondent, applicable to members, which would have injured other competing exchanges. Although not dealing explicitly with the power of exchanges, but only with the propriety of the rule, the Commission indicated the danger of abuse in exchange rule-making and stated disapprovingly that the Exchange was seeking to regulate the conduct of its members on that Exchange as well as their conduct on other exchanges of which they were members. 10 S.E.C. 270, 286.

take of fact. Although many familiar privileges have exactly this consequence, the extent of a new privilege or immunity cannot be fairly defined without balancing the need against the danger of uncompensated loss to innocent victims.

The court of appeals suggested that even though the Act gave the Exchange an absolute immunity under the antitrust laws, petitioners were not "without a remedy" against "arbitrary or unreasonable" action by the Exchange. The court did not specify what that remedy might be. The statute creates none. We know of no doctrine that creates a special statutory remedy against a non-governmental organization that abuses the powers of self-regulation granted by a federal statute. It would seem that, apart from the Sherman Act, any action would have to be brought in tort for a conspiracy to interfere with petitioner's advantageous business relations with member firms. In such an action petitioners would undoubtedly be met with the very defense that is offered here—that the harm, if any, was *damnum absque injuria* because the Exchange is granted an absolute immunity by the Securities Exchange Act concomitant with the statutory duties imposed. There is nothing in that Act which distinguishes between liability under the Sherman Act and liability in tort. To the extent that a privilege or immunity is necessary to facilitate action by the exchanges to perform their regulatory duties, immunity from one form of liability is as necessary as immunity from the other. If it be said that liability under the Sherman Act is espe-

cially harsh, the answer is that this is partly because the remedy is especially effective. There is no reason to suppose that Congress would have wished to wipe out the effective remedies while leaving those that were inadequate.

(c) *Remedies under the Securities Exchange Act.*— The availability or unavailability of remedies under the Securities Exchange Act is a relevant consideration in determining whether Congress intended that Act to confer broad antitrust immunity. The claim of an absolute immunity might have somewhat greater appeal if the statute provided some alternative method for correcting arbitrary disciplinary action by an exchange. Under the 1934 Act, however, the Commission cannot review the application of the rules of an exchange in a particular case (although it may "alter or supplement" particular rules themselves, see Section 19(b), n. 15, *supra*, p. 29). The lack of any provision for Commission review of disciciplinary actions by the exchanges is in sharp contrast to the Maloney Act, which specifically provides for Commission review of disciplinary action by associations of brokers and dealers. Section 15A(g) and (h). Commission action thereon is in turn subject to judicial review. Section 25. The Commission on occasion has reversed disciplinary actions by the N.A.S.D. See, *e.g., In the Matter of National Association of Securities Dealers, Inc.,* 19 S.E.C. 424.[28]

[28] In that case the NASD had imposed penalties on certain members for breaching a provision in an underwriting agreement requiring them to observe fixed prices in selling the underwritten securities to the public. Such breach of contract,

The provisions for Commission and judicial review of disciplinary action by the NASD afford its members protection against illegal or arbitrary action by their organization. Such right of review presumably was a significant factor in the Congressional determination specifically to provide that the Maloney Act is to prevail over any conflicting law in force on the date of its enactment.[29] The absence of similar provisions for Commission or judicial review of particular disciplinary actions by the exchanges, together with the lack of any specific immunity provision for such actions, is strong evidence that Congress intended that disciplinary actions by the exchanges, like those of other private groups, should continue, at least to some degree, to be subject to the antitrust laws. Cf. *United States* v. *Morgan,* 118 F. Supp. 621, 697 (S.D. N.Y.), where Judge Medina relied on the immunity provision of the Maloney Act in ruling that the provisions of

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the NASD held, was "conduct inconsistent with just and equitable principles of trade." The Commission set aside the NASD's action, on the ground that the Association rule under which the NASD had acted did not authorize the disciplining of members for violating price-maintenance provisions in underwriting agreements. 19 S.E.C. at 444.

[29] This provision (Section 15A(n) does not in terms provide antitrust immunity, and the legislative history does not indicate that it was specifically intended to do so. It has nevertheless been interpreted as conferring some measure of antitrust immunity. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 227, n. 60; *International Association of Machinists* v. *Street*, 367 U.S. 740, 809, n. 16 (dissenting opinion of Mr. Justice Frankfurter); *In the Matter of National Association of Security Dealers, Inc.*, 19 S.E.C. 424, 478, n. 9 (dissenting opinion of Commissioner Healy); 2 Loss, *Securities Regulation* (2d ed., 1961) 1370.

the 1934 Act (other than the Maloney Act) do not "amount to an implied exemption, in whole or in part, from the provisions of the Sherman Act."

3. *A securities exchange does not have an absolute immunity from liability under the Sherman Act for causing its members to cut off wire service from a nonmember firm.*

While the rule under which the Exchange acted contains no standards (see *supra*, pp. 7–8) and the Exchange made no findings, we assume that the Exchange's action was based upon its determination that petitioners were so lacking in integrity and reliability that termination of their wire connections with Exchange members was required to carry out the Exchange's self-regulatory functions under the Act. See R. 94–95, 177–180, 187. We return now to the central issue in the instant case—whether the Exchange has an absolute immunity against liability under the Sherman Act for such action, when its determination was made without reasonable investigation and was also an arbitrary and irrational inference from the known facts.

The Exchange's action was within the general area of its responsibilities under the Securities Exchange Act. An exchange's regulatory authority and duty are not limited to transactions on the exchange, but also extend to members' transactions and relationships with nonmembers who operate in the over-the-counter market. We disagree with petitioners' contention (Br., pp. 22–27) that the separate statutory scheme under Section 15A for regulating brokers and dealers in the over-the-counter market shows that an exchange's

regulatory authority does not extend to controlling its members' relationships with nonmembers operating in that market. Although Section 15A imposes the *primary* responsibility for regulating the over-the-counter market upon the NASD, under the supervision and review of the Commission, this does not establish that an exchange can never take disciplinary action against its members because of their business dealings with nonmembers. True, in most instances the appropriate agency for dealing with improper practices in the over-the-counter market is the NASD. But the broad regulatory responsibilities of an exchange require it to police its members' business dealings both on and off the exchange, in listed as well as in unlisted securities. An exchange must also regulate actions by its members in concert with, or on behalf of, nonmembers; it is a ground for expulsion of an exchange member by the Commission that he "has effected any transaction for any other person who, he has reason to believe, is violating the Act or Commission regulations 'in respect of such transactions'" (Sec. 19(a)(3)). The statutory injunction that exchange rules must insure "fair dealing" and "protect investors" (Sec. 6(d)) reflects a congressional intention that the exchanges should regulate all conduct by their members which may adversely affect the interests of investors, even though such members may not be directly or consciously responsible for any wrongdoing. Thus, there may be cases—although this is not one—in which an exchange may be justified in requiring its members to take action affecting conditions in the over-the-counter market.

Apart from the point just mentioned, there is no challenge here to the standard of conduct that the Exchange was apparently attempting to apply. Although the only formal rule of the Exchange was that requiring that private wire connections between members and non-members be approved by the Exchange and terminated upon its direction, still it appears that the Exchange in this instance was applying a standard of integrity and reliability. The termination of members' wire connections with brokers and dealers who lack integrity and reliability is certainly conducive to the promotion of member conduct consistent with just and equitable principles of trade. The absence of any challenge to the standard of conduct that the Exchange was enforcing obviates the necessity for a ruling upon how and where the decision is to be made when an Exchange rule is attacked either as unrelated to the promotion of the just and equitable principles of trade, or as an unreasonable method for achieving the end. To put the case at bar in perspective, however, we point out that some machinery for making such decisions is essential, other than the exchange itself; otherwise the exchanges would be free to restrain competition in areas quite unrelated to their regulatory duties. For example, if an exchange were to adopt a rule forbidding its members to furnish wire service to any broker or dealer who sold listed securities outside the exchange, someone would have to decide whether this rule was unlawful under the Sherman Act or privileged as necessary to promote just and equitable principles of trade.

One possibility is that the question must be tried out in litigation under the Sherman Act; and in that event it might well be argued that the rule that trade boycotts are unlawful *per se* should be inapplicable because otherwise the exchanges could exert no regulatory power. Self-regulation necessarily involves concerted adherence by the members of the exchange to standards and restrictions evolved in the self-regulatory process, and requires concerted action by exchange members to make effective sanctions imposed to secure compliance therewith. The question would become whether the restraint was reasonable in the light of its alleged tendency to promote just and equitable principles of trade. To answer the question the court would not only be required to define the scope of the term "just and equitable principles of trade" but might find it necessary to balance any beneficient tendency of the rule to promote the objectives against any restrictive effect upon competition.

Alternatively, the Securities Exchange Act might be construed as giving the Commission power to make the final decision upon such questions, subject to such judicial review as the Act may provide. Under Section 6 the rules promulgated by an exchange must be filed with the Commission, and Section 19(b) gives the Commission authority to "alter or supplement" particular rules. The court below concluded that any rule not disapproved by the Commission must be deemed approved by it and cannot be challenged in litigation under the antitrust laws. The Commission is aware of its responsibility in the administration of the securities laws to achieve a reasonable accommoda-

tion or balance between the salutary purposes of those laws and the antitrust laws, and it points out that the supervision of self-regulatory activities does involve weighing of alternatives and of perhaps conflicting objectives in the context of particular practices and problems. The Commission believes that as a matter of governmental policy the Commission, the agency designated by Congress to supervise the securities industry, including the exchanges, in the public interest, is the logical agency to make determinations in this area—especially because the interjection of antitrust procedures and doctrines at the behest of private litigants or indeed of other agencies of government could seriously impair the ability of the Commission, as an independent agency, to exercise its supervisory functions under the Act.

There are strong arguments against this view. It would give an administrative agency, whose attention is focussed upon one set of objectives and which is subject to one set of pressures, unprecedented power to grant exemptions from laws designed to preserve competition without any statutory indication that Congress intended to delegate the power to immunize. Exemptions and power to grant antitrust immunity are not lightly implied. *California* v. *Federal Power Commission,* 369 U.S. 482. Furthermore, one may question the fairness or efficacy of a procedure that makes an exchange's rules binding unless the Commission chooses to scrutinize and to alter or suspend them, perhaps without judicial review. Accordingly, we take no position upon this question, but strongly urge the Court to pretermit the issue as a question not raised by the present case.

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Moreover, since the primary claim here is that the Exchange's procedure was unfair and its conclusions were arbitrary and capricious because lacking any adequate factual basis, any presumed Commission approval of the Exchange's regulations is utterly irrelevant. The rules merely provide that no exchange member may maintain any wire connection with any nonmember without the prior consent of the Exchange, and that the Exchange may at any time require that any means of communication be terminated, but without specifying any standards for Exchange action (R. 196–197). Furthermore, in reviewing such rules the Commission plainly does not, and indeed, could not, evaluate either the more particular standards or the procedures which an exchange may later follow in administering the rules. The minimum price of Commission approval—assuming that it carries immunity—would seem to be full disclosure of the precise meaning and detailed application of the rules. For example, approval of a bare rule that requires Exchange approval of private wire connections with non-members could hardly be supposed, without further disclosure, to approve cutting off wire service to non-members who traded in listed securities outside the Exchange, because the Exchange concluded that all trading in listed securities should be through its facilities. *A fortiori* the Commission cannot be supposed to give advance blessing to an undisclosed procedure and allegedly capricious conclusions in particular instances occurring long after the rule was promulgated. And the Commission has no authority to pass judgment upon the manner in which an exchange administers its rules.

Accordingly, if there is to be any scrutiny of such challenges to an exchange's activities in applying its rules to particular cases, an action must lie for damages or equitable relief.

Confining ourselves here and in all the discussion that follows exclusively to cases involving the application of a particular lawful standard—such as that of integrity and reliability—to a particular case, we urge that there is no need to grant the absolute immunity for unfair procedure and arbitrary and capricious determinations provided by the court below. There is no basis for supposing that such sweeping immunity is necessary to encourage the exchanges vigorously to carry out their disciplinary responsibilities, or that they will be reluctant or unwilling to do so unless they enjoy an immunity even for "arbitrary or unreasonable" (R. 267) actions. We know of no instance in which the law provides so sweeping an immunity for private groups, and we submit that one should not be provided unless there is a clear indication that Congress so intended. In the present case the most that can be said is that the self-regulatory scheme for exchanges impliedly authorizes them to take certain concerted action which, were it not for the regulatory scheme, would violate the Sherman Act. The need for some measure of immunity to carry out their regulatory responsibilities affords no basis for implying to Congress the intention to permit them complete immunity whenever they purport to be exercising that authority.

On the other hand, we think it unfair and a serious deterrent to the statutory policy of encouraging self-regulation to hold that an exchange is liable in dam-

ages for mere mistakes of judgment after a reasonable investigation. The law commonly gives a privilege to those who act reasonably in pursuit of a recognized interest even though a judge or jury later finds them to be wrong. *E.g., Restatement of Torts*, §§ 119, 143, 147, 196, 204. In our view, when an exchange is applying to a particular case a rule which is admittedly, or has authoritatively been determined to be, within the permissible limits of regulatory action, it is not liable if its action was taken in good faith and had a reasonable factual foundation. Such a privilege, we believe, is a necessary and appropriate concommitant of the statutory duties imposed.[30]

To come within the privilege two conditions must be satisfied:

(1) Prior to acting, the exchange must have taken reasonable steps to ascertain all the facts. What is reasonable will depend upon the circumstances, but

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[30] This case does not raise any question as to whether the Exchange may continue to require its members to cut off wire service from a nonmember when its investigation was reasonable and reasonable conclusions were drawn from the evidence, but the nonmember is able to demonstrate that the Exchange in fact was wrong. Two ways of dealing with this problem are available. First, it might be held that since the question of whether cutting off the nonmember would tend to promote just and equitable principles of trade is committed to the Exchange, there is no room for judicial review of its findings of fact which have reasonable support. On the other hand, it might be concluded that while the Exchange needs immunity from liability in damages to facilitate its undertaking the task of self-regulation, this policy does not apply to injunctive relief and there is therefore no reason why the court should not make its own determination. We note that although public officials have certain immunity from damage liability for acts done in their official capacity (see *supra*, pp. 34–35), they may nevertheless sometimes be subject to injunction to reverse their actions. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690–691, 702.

a reasonable investigation would ordinarily include conducting a thorough inquiry, giving the nonmember a statement of the reasons why the services are proposed to be terminated, and affording him an appropriate opportunity to answer and refute the charges.

(2) The conclusions (in terms of the authorized standards) which the exchange draws from the facts before it, including those developed both by it and by the nonmember, must be reasonable.

Where both of these conditions are met—an adequate investigation by the agency and reasonable conclusions drawn from the facts there developed—then, but only then, the action of the exchange in terminating the wire connections is privileged.

An example may make the standard clearer. Suppose an exchange receives hearsay reports that a nonmember, with whom some of its members have wire connections, is using such connections to obtain information which he, in turn, uses to defraud the public. If, without more, the exchange were then summarily and permanently to terminate the wire connections, we do not think that its action would be privileged.[31] For while a reasonable belief that a nonmember was using wire services to aid in defrauding the public would ordinarily justify the conclusion that termination of such services was necessary to promote "just and equitable principles of trade," the mere receipt of such reports by the exchange would not be enough, without further investigation, to warrant the exchange in taking the drastic

[31] Whether a temporary suspension pending further inquiry would be privileged is a more difficult question that might depend upon details concerning the circumstances.

remedy of cutting off the nonmember's services. If, however, a careful investigation by the exchange substantiated the reports it had received, and if the nonmember failed to submit any countervailing material, then the exchange's termination of such wire services would be privileged. It would not lose such privilege if it subsequently should develop that the facts were otherwise, and that in actuality the nonmember was not really defrauding the public at all.

The test which we have suggested—limited, as we have indicated, to the particular narrow issue before the Court—would, we believe, provide the exchanges with a sufficient degree of flexibility and protection to enable them properly to perform their duties. Conversely, the public interest in protecting nonmembers against possibly arbitrary action by the exchange in terminating these vital wire services dictates that, unless the exchange has made reasonable efforts to ascertain fully the facts in a particular case, and unless its action appears reasonable in relation to those facts, it cannot properly claim a privilege for such actions. It plainly is not entitled to an absolute privilege merely because its actions are "within the scope of its statutory authority in the enforcement of its rules" (R. 264), and without regard to whether such action is "arbitrary or unreasonable" in the particular case (R. 267).

B. THE ACTION OF THE EXCHANGE IN DIRECTING ITS MEMBER FIRMS TO SEVER WIRE CONNECTIONS WITH THE PETITIONERS IS NOT IMMUNE FROM THE ANTITRUST LAWS

Since the court of appeals held that the Exchange had an absolute immunity, it did not consider whether

the Exchange's action would be immune under the narrower standard we have suggested. If this Court agrees with us as to the governing standard, the normal practice would be to remand the case to the court of appeals for reconsideration under that standard. However, since the district court fully analyzed (but rejected) the reasons given by the Exchange in justification of its actions, and since the record is a short one, this Court might deem it appropriate itself to decide whether the Exchange has antitrust immunity for terminating petitioners' wire connections. Cf. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 508. We shall therefore briefly set forth the reasons why we believe the Exchange's claim of antitrust immunity cannot be sustained in this case.

1. *The Exchange's procedures in this case were arbitrary.*

In the present case, the Exchange gave petitioners no advance notice of, or explanation for, its termination of their wire services. All attempts by petitioners to ascertain the reasons therefor, and to meet any charges that might have been made against them, fell on deaf ears. See the Statement, *supra*, pp. 9–12. The Exchange presented no facts which even suggested that such summary action on its part was necessary to protect investors against any immediate threat; on the contrary, all of the grounds upon which the Exchange subsequently attempted to justify its conduct involved incidents that had taken place substantial periods before it acted.

Furthermore, while the Exchange stated (R. 97) that it had made an investigation of petitioners, the

thoroughness of such investigation seems open to question. With respect to one of the four grounds upon which the Exchange based its action—the charge that Silver had made a misstatement in connection with the acquisition of certain stock (see *infra*, pp. 55–56)—the district court found (R. 230) that had the Exchange first checked with the Securities and Exchange Commission, it would have discovered that Silver had submitted a statement to the Commission which exculpated him.

In sum, the court of appeals properly characterized the Exchange's procedure in this case as "arbitrary" (R. 267). The use of such an arbitrary procedure destroys any immunity claim which the Exchange otherwise might have.

2. *The Exchange Did Not Have Reasonable Grounds for Its Conclusions.*

Not only were the Exchange's procedures in this case arbitrary, but none of the four grounds upon which the Exchange relied justified the conclusion that termination of petitioners' wire services was necessary to insure "just and equitable principles of trade" because petitioners lacked integrity and reliability relevant to the securities business. (a) Since the Exchange has never revealed the alleged derogatory information about Silver, it is impossible to know whether such information would justify its action. (b) The fact that the Defense Department had revoked the security clearance of Silver and certain companies with which he was then connected was not, of itself, sufficient to establish that Silver was not

a suitable person for the securities business; there are grounds for revoking security clearance quite unrelated to a man's personal character. Indeed, the district court found (R. 231) that, at the time the Exchange took its action against petitioners it had no knowledge of the grounds upon which the Defense Department's action was based. (c) As to Silver's failure to state, in his application to the Exchange, the names of two corporations with which he had been associated, the district court found that there was nothing which contraverted Silver's claim that these omissions were inadvertent or which showed "that there was anything wrong with these corporations or anything remotely improper with Silver's connection with them" (R. 231). Although the test is whether the Exchange acted reasonably upon the information before it, the omission, even standing alone, was too insubstantial a basis. (d) With respect to the charge that Silver had stated in writing when he acquired stock of the U. S. Hoffman Machinery Company [32] that he had no intention of selling it but that two

[32] The extent to which the Exchange relied on this incident is unclear. The assistant director of the Exchange's Department of Member Firms testified on deposition (R. 113):

> Q. Did any of the reasons for the Exchange's disapproval action have to do with securities transactions?
>
> A. Not directly. I think I explained to you in previous questioning—possibly I didn't—there were certain areas of information which were not in themselves a basis for the action, but which very possibly might have been considered had there not been, in our opinion, sufficient basis without them.
>
> Q. Are you referring to the transactions in the stock of U.S. Hoffman Manufacturing Company?
>
> A. Yes.

months later he began to sell it (R. 97, 230), the district court correctly ruled that there was "no merit to the claim that these facts indicate that the Silvers were untrustworthy." As the court noted, had the Exchange first checked with the Securities and Exchange Commission, it would have found that Silver had submitted material to the Commission in justification of the sale which showed "that the Silvers did not act in bad faith either in the statements made at the time of acquisition or in making the sales" (R. 230).

The district court reviewed the grounds on which the Exchange sought to justify its action (R. 229–233), and found as an "inescapable conclusion" that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed" (R. 233). The court of appeals did not disturb that finding (R. 267). For the foregoing reasons we think the finding correct.

Plainly, the claimed grounds for the Exchange's action provide no reasonable basis for a conclusion that petitioners might violate the law, or that member firms might, by maintaining wire connections with petitioners, themselves engage in conduct in securities transactions "inconsistent with just and equitable principles of trade," or unwittingly become involved in unfair dealing or conduct detrimental to investors. To the contrary, the record shows that firms of national repute having business relations with petitioners advised the Exchange that petitioners enjoyed a good reputation in the securities business. Thus the Chase-Manhattan Bank, in a letter which the district court described as "representative of

letters sent to the Exchange" concerning the business reputation of petitioners, advised the Exchange (R. 211):

> It is our pleasure to write to you in behalf of the Municipal Securities Company in Dallas, Texas. While this firm is not a depositor of ours, it has been well and favorably known to us for some time.
>
> Our Bond Department has had transactions with the Municipal Securities Company in the form of municipal underwriting, syndicate and dealing operations which were always handled in an exemplary manner by the subject. Several of the principals are personally known to us and are considered to be men of ability and integrity.
>
> In short, we have a high regard for both the firm and its management, and are pleased to commend them to you as proper and responsible parties with which to have business dealings.

The record provides yet another reason why the Exchange cannot link its severance of petitioners' wire connections to the prevention of misconduct by members in securities transactions or their involvement in improper activities of nonmembers. The Exchange did not forbid its members from all dealing with petitioners; it permitted such business to continue, but under conditions which disadvantaged petitioners vis-à-vis competitors who continued to maintain private wire connections with respondent's members (R. 31–34, 43–44, 100, 169–172, 173, 226–227, 233). In such circumstances, the Exchange cannot claim that its ac-

tion against petitioners was designed to protect its members from *dealing* with people who were themselves likely to engage in improper securities transactions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DANIEL M. FRIEDMAN,
Assistant to the Solicitor General.

JANUARY 1963.

APPENDIX

The pertinent provisions of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a, *et seq.*, are as follows:

Necessity for Regulation as Provided in This Title

SECTION 2. For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate com-

merce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is

put to such great expense as to burden the national credit.

* * * *

Transactions on Unregistered Exchanges

SECTION 5. It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as a national securities exchange under section 6 of this title, or (2) is exempted from such registration upon application by the exchange because, in the opinion of the Commission, by reason of the limited volume of transactions effected on such exchange, it is not practicable and not necessary or appropriate in the public interest or for the protection of investors to require such registration.

Registration of National Securities Exchanges

SECTION 6. (a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules of procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate

notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

* * * * *

Over-the-Counter Markets

SECTION 15 [as amended, 49 Stat. 1377, *et seq.*]. (a) No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

(b) A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to such broker or dealer and any person directly or indirectly controlling or controlled by, or under direct or indirect common

control with, such broker or dealer, as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine.

* * * * *

The Commission shall, after appropriate notice and opportunity for hearing, by order deny registration to or revoke the registration of any broker or dealer if it finds that such denial or revocation is in the public interest and that (1) such broker or dealer whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, (A) has willfully made or caused to be made in any application for registration pursuant to this subsection or in any document supplemental thereto or in any proceeding before the Commission with respect to registration pursuant to this subsection any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact; or (B) has been convicted within ten years preceding the filing of any such application or at any time thereafter of any felony or misdemeanor involving the purchase or sale of any security or arising out of the conduct of the business of a broker or dealer; or (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security; or (D) has willfully violated any provision of the Securi-

ties Act of 1933, as amended, or of this title, or of any rule or regulation thereunder. * * *

* * * * *

SEC. 15A [As added in 1938 by the Maloney Act, 52 Stat. 1070 (15 U.S.C. 78o–3)]. (a) Any association of brokers or dealers may be registered with the Commission as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section, by filing with the Commission a registration statement in such form as the Commission may prescribe, setting forth the information, and accompanied by the documents, below, specified:

(1) Such data as to its organization, membership, and rules of procedure, and such other information as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors; and

(2) Copies of its constitution, charter, or articles of incorporation or association, with all amendments thereto, and of its existing bylaws, and of any rules or instruments corresponding to the foregoing, whatever the name, hereinafter in this title collectively referred to as the "rules of the association."

Such registration shall not be construed as a waiver by such association or any member thereof of any constitutional right or of any right to contest the validity of any rule or regulation of the Commission under this title.

(b) An applicant association shall not be registered as a national securities association unless it appears to the Commission that—

(1) by reason of the number of its members, the scope of their transactions, and

the geographical distribution of its members such association will be able to comply with the provisions of this title and the rules and regulations thereunder and to carry out the purposes of this section;

(2) such association is so organized and is of such a character as to be able to comply with the provisions of this title and the rules and regulations thereunder, and to carry out the purposes of this section;

(3) the rules of the association provide that any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, may become a member of such association, except such as are excluded pursuant to paragraph (4) of this subsection: *Provided*, That the rules of the association may restrict membership in such association on such specified geographical basis, or on such specified basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purpose of this section;

(4) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no broker or dealer shall be admitted to or continued in membership in such association, if (1) such broker or dealer, whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer

(or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, (A) has been and is suspended or expelled from a registered securities association (whether national or affiliated) or from a national securities exchange, for violation of any rule of such association or exchange which prohibits any act or transaction constituting conduct inconsistent with just and equitable principles of trade, or requires any act the omission of which constitutes conduct inconsistent with just and equitable principles of trade, or (B) is subject to an order of the Commission denying or revoking his registration pursuant to section 15 of this title, or expelling or suspending him from membership in a registered securities association or a national securities exchange, or (C) by his conduct while employed by, acting for, or directly or indirectly controlling or controlled by, a broker or dealer, was a cause of any suspension, expulsion, or order of the character described in clause (A) or (B) which is in effect with respect to such broker or dealer;

(5) the rules of the association assure a fair representation of its members in the adoption of any rule of the association or amendment thereto, the selection of its officers and directors, and in all other phases of the administration of its affairs;

(6) the rules of the association provide for the equitable allocation of dues among its members, to defray reasonable expenses of administration;

(7) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and

equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges;

(8) the rules of the association provide that its members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or any other fitting penalty, for any violation of its rules;

(9) the rules of the association provide a fair and orderly procedure with respect to the disciplining of members and the denial of membership to any broker or dealer seeking membership therein. In any proceeding to determine whether any member shall be disciplined, such rules shall require that specific charges be brought; that such member shall be notified of, and be given an opportunity to defend against, such charges; that a record shall be kept; and that the determination shall include (A) a statement setting forth any act or practice in which such member may be found to have engaged, or which such member may be found to have omitted, (B) a statement setting forth the specific rule or rules of the association of which any such act or practice, or omission to act, is deemed to be in violation, (C) a statement whether the acts or practices prohibited by such rule or rules, or the omission of any act required thereby, are deemed to constitute conduct

inconsistent with just and equitable principles of trade, and (D) a statement setting forth the penalty imposed. In any proceeding to determine whether a broker or dealer shall be denied membership, such rules shall provide that the broker or dealer shall be notified of, and be given an opportunity to be heard upon, the specific grounds for denial which are under consideration; that a record shall be kept; and that the determination shall set forth the specific grounds upon which the denial is based; and

(10) the requirements of subsection (e), insofar as these may be applicable, are satisfied.

* * * * *

(e) Upon the filing of an application for registration pursuant to subsection (b) or subsection (d), the Commission shall by order grant such registration if the requirements of this section are satisfied. If, after appropriate notice and opportunity for hearing, it appears to the Commission that any requirement of this section is not satisfied, the Commission shall by order deny such registration. If any association granted registration as an affiliated securities association pursuant to subsection (d) shall fail to be admitted promptly thereafter to affiliation with a registered national securities association, the Commission shall revoke the registration of such affiliated securities association.

(f) A registered securities association (whether national or affiliated) may, upon such reasonable notice as the Commission may deem necessary in the public interest or for the protection of investors, withdraw from registration by filing with the Commission a written notice of withdrawal in such form as the Commission may by rules and regulations prescribe. Upon the withdrawal of a national securities associa-

tion from registration, the registration of any association affiliated therewith shall automatically terminate.

(g) If any registered securities association (whether national or affiliated) shall take any disciplinary action against any member thereof, or shall deny admission to any broker or dealer seeking membership therein, such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby filed within sixty days after such action has been taken or within such longer period as the Commission may determine. Application to the Commission for review, or the institution of review by the Commission on its own motion, shall operate as a stay of such action until an order is issued upon such review pursuant to subsection (h).

(h)(1) In a proceeding to review disciplinary action taken by a registered securities association against a member thereof, if the Commission, after appropriate notice and opportunity for hearing, upon consideration of the record before the association and such other evidence as it may deem relevant, shall (A) find that such member has engaged in such acts or practices, or has omitted such act, as the association has found him to have engaged in or omitted, and (B) shall determine that such acts or practices, or omission to act, are in violation of such rules of the association as have been designated in the determination of the association, the Commission shall by order dismiss the proceeding, unless it appears to the Commission that such action should be modified in accordance with paragraph (2) of this subsection. The Commission shall likewise determine whether the acts or practices prohibited, or the omission of any act required, by any such rule constitute conduct inconsistent with just and equitable principles of trade, and shall so declare. If it appears to the Com-

mission that the evidence does not warrant the finding required in clause (A), or if the Commission shall determine that such acts or practices as are found to have been engaged in are not prohibited by the designated rule or rules of the association, or that such act as is found to have been omitted is not required by such designated rule or rules, the Commission shall by order set aside the action of the association.

(2) If, after appropriate notice and opportunity for hearing, the Commission finds that any penalty imposed upon a member is excessive or oppressive, having due regard to the public interest, the Commission shall by order cancel, reduce, or require the remission of such penalty.

(3) In any proceeding to review the denial of membership in a registered securities association, if the Commission, after appropriate notice and hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, shall determine, that the specific grounds on which such denial is based exist in fact and are valid under this section, the Commission shall by order dismiss the proceeding; otherwise, the Commission shall by order set aside the action of the association and require it to admit the applicant broker or dealer to membership therein.

(i) (1) The rules of a registered securities association may provide that no member thereof shall deal with any nonmember broker or dealer (as defined in paragraph (2) of this subsection) except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

(2) For the purposes of this subsection, the term "nonmember broker or dealer" shall include any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction

in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, who is not a member of any registered securities association, except a broker or dealer who deals exclusively in commercial paper, bankers' acceptances, or commercial bills.

(3) Nothing in this subsection shall be so construed or applied as to prevent any member of a registered securities association from granting to any other member of any registered securities association any dealer's discount, allowance, commission, or special terms.

(j) Every registered securities association shall file with the Commission in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, copies of any changes in or additions to the rules of the association, and such other information and documents as the Commission may require to keep current or to supplement the registration statement and documents filed pursuant to subsection (a). Any change in or addition to the rules of a registered securities association shall take effect upon the thirtieth day after the filing of a copy thereof with the Commission, or upon such earlier date as the Commission may determine, unless the Commission shall enter an order disapproving such change or addition; and the Commission shall enter such an order unless such change or addition appears to the Commission to be consistent with the requirements of subsection (b) and subsection (d).

(k)(1) The Commission is authorized by order to abrogate any rule of a registered securities association, if after appropriate notice and opportunity for hearing, it appears to the Commission that such abrogation is necessary or appropriate to assure fair dealing by the members of such association, to assure a fair

representation of its members in the administration of its affairs or otherwise to protect investors or effectuate the purposes of this title.

(2) The Commission may in writing request any registered securities association to adopt any specified alteration of or supplement to its rules with respect to any of the matters hereinafter enumerated. If such association fails to adopt such alteration or supplement within a reasonable time, the Commission is authorized by order to alter or supplement the rules of such association in the manner theretofore requested if, after appropriate notice and opportunity for hearing, it appears to the Commission that such alteration or supplement is necessary or appropriate in the public interest or for the protection of investors or to effectuate the purposes of this section, with respect to: (1) The basis for, and procedure in connection with, the denial of membership or the disciplining of members; (2) the method for adoption of any change in or addition to the rules of the association; (3) the method of choosing officers and directors; and (4) affiliation between registered securities associations.

(l) The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

(1) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to revoke the registration of a registered securities association, if the Commission finds that such association has violated any provision of this title or any rule or regulation thereunder, or has failed to enforce compliance with its own rules, or has engaged in any other activity tending to defeat the purposes of this section;

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a registered securities association any member thereof who the Commission finds (A) has violated any provision of this title or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this title or any rule or regulation thereunder, or (B) has willfully violated any provision of the Securities Act of 1933, as amended, or of any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule or regulation;

(3) after appropriate notice and opportunity for hearing, by order to remove from office any officer or director of a registered securities association who, the Commission finds, has willfully failed to enforce the rules of the association, or has willfully abused his authority.

(m) Nothing in this section shall be construed to apply with respect to any transaction by a broker or dealer in any exempted security.

(n) If any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provision of this section shall prevail.

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Powers With Respect to Exchanges and Securities

SECTION 19. (a) The Commission is authorized, if in its opinion such action is necessary

or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this title or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(2) After appropriate notice and opportunity for hearing, by order to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw, the registration of a security if the Commission finds that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder.

(3) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of this title or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction any provision of this title or the rules and regulations thereunder.

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such ex-

change effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

(c) The Commission is authorized and directed to make a study and investigation of the

rules of national securities exchanges with respect to the classification of members, the methods of election of officers and committees to insure a fair representation of the membership, and the suspension, expulsion, and disciplining of members of such exchanges. The Commission shall report to the Congress on or before January 3, 1935, the results of its investigation, together with its recommendations.

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Effect on Existing Law

SECTION 28. (a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

(b) Nothing in this title shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect on any such member of any disciplinary action taken by the authorities of the exchange as a result of violation of any rule of the exchange, insofar as the action taken is not inconsistent with the provisions of this title or the rules and regulations thereunder.

The pertinent provisions of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et. seq.* are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The pertinent provisions of the Clayton Act, 38 Stat. 731, 737, 15 U.S.C. 15, 26, are as follows:

> SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the

United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *

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